

**Attachment C**  
**Contribution Agreement**

**NEWCOMM WIRELESS SERVICES, INC.**

**CONTRIBUTION AGREEMENT**

**BY AND AMONG**

**CLEARCOMM, L.P.**

**TELEFÓNICA LARGA DISTANCIA DE PUERTO RICO, INC.**

**AND**

**NEWCOMM WIRELESS SERVICES, INC.**

**MAY 20, 2002**

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## CONTRIBUTION AGREEMENT

THIS **CONTRIBUTION** AGREEMENT is entered into by and among ClearComm, L.P., a limited partnership organized and existing under the laws of the State of Delaware ("ClearComm"), Telefonica Larga Distancia de Puerto Rico, Inc., a corporation organized and existing under the laws of the Commonwealth of Puerto Rico ("TLD"), and NewComm Wireless Services, Inc., a corporation organized and existing under the laws of the Commonwealth of Puerto Rico (the "Company"), as of and effective May 20, 2002 (the "Agreement"). ClearComm, TLD and the Company shall hereinafter be collectively referred to as the "Parties."

### **WITNESSETH**

WHEREAS, ClearComm, TLD and Syndicated Communications Venture Partners IV ("SynCom") are parties to that certain Joint Venture Agreement dated February 4, 1999, as amended (the "Joint Venture Agreement");

WHEREAS, ClearComm and SynCom are shareholders of the Company and TLD is a creditor of the Company and holds a Secured Convertible Promissory Note originally issued by NewComm on March 3, 1999, as amended and substituted from time to time (the "SCPN") and three other convertible promissory notes, all of which are convertible into shares of NewComm;

**WHEREAS**, ClearComm is also the holder of a promissory note issued by NewComm dated August 9, 2001 in the principal amount of \$3,000,000 and a promissory note issued by NewComm dated March 11, 2002 in the principal amount of \$5,000,000 ("ClearComm's Promissory Notes");

WHEREAS, ClearComm desires to contribute \$9,036,072 to the capital of NewComm, to be paid for in part by the cancellation of ClearComm's Promissory Notes and in part in cash; and

WHEREAS, TLD desires to lend NewComm \$9,000,000 in cash in exchange for a convertible promissory note.

NOW, THEREFORE, in consideration of the foregoing, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

**ARTICLE I**  
**CONTRIBUTION**

Section **1.01** **Purchase and Issuance of Shares.** Subject to the terms and conditions of this Agreement, pursuant to Section 1.05(a) of the Joint Venture Agreement and in reliance on the representations, warranties and agreements contained herein:

a. ClearComm agrees to contribute ClearComm's Promissory Notes to the capital of NewComm as soon as practicable, but in no event later than July **15,2002** (the "Contribution Date"), and from the date hereof ClearComm forever renounces all right to payment of principal and interest and any other right thereunder. ClearComm's Notes will cease to accrue interest as of the date hereof.

b. ClearComm hereby contributes the **sum** of \$819,614.27 in readily available funds to NewComm (the "Cash Amount") in exchange for a non-interest bearing promissory note which shall be contributed to the capital of NewComm on the Contribution Date (the "New Note"). The sum of the Cash Amount plus the accrued interest on ClearComm's Promissory Notes **as** of the effective date of this Agreement totals \$1,036,072.

c. On the Contribution Date, and upon delivery by ClearComm of ClearComm's Promissory Notes and the New Note to NewComm **for** cancellation, NewComm agrees to issue to ClearComm that number of shares of its Class A Common Stock reasonably determined by ClearComm.

d. TLD hereby lends the sum of \$9,000,000 to NewComm, in consideration for which NewComm hereby issues to **TLD** the Fourth Convertible Promissory Note in substantially the form of Exhibit A attached hereto

Section **1.02** ClearComm's Deliveries. Simultaneously with the execution of this Agreement, ClearComm shall deliver to NewComm the following:

- a. A certified check in the amount of \$819,614.27.

Section **1.03** TLD's Deliveries. Simultaneously with the execution of this Agreement, TLD shall deliver to NewComm the following:

- a. Nine Million Dollars (\$9,000,000) by wire transfer in immediately available funds.
- b. The SCPN, for its cancellation and substitution with a new SCPN in substantially the form of Exhibit B hereto.

Section **1.04** NewComm's Deliveries. Simultaneously with the execution **of** this Agreement, NewComm shall deliver to TLD the Fourth Convertible Promissory Note and the new SCPN.

## ARTICLE II REPRESENTATIONS AND WARRANTIES OF CLEARCOMM

ClearComm represents and warrants to NewComm that:

Section 2.01 Organization. ClearComm is a limited partnership duly organized and validly existing under the laws of the State of Delaware.

Section 2.02 Authority. ClearComm has the full right, power, and authority (including full partnership power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the transactions contemplated in this Agreement, except as may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, ClearComm's general partner has taken all corporate action necessary to authorize, and has duly authorized the execution, delivery, and performance of this Agreement by ClearComm. This Agreement constitutes a valid and legally binding obligation of ClearComm, enforceable in accordance with its terms and conditions.

Section **2.03 No Conflicts**. Neither the execution and delivery of ~~this~~ Agreement, nor ~~the~~ consummation of the ~~transactions~~ contemplated hereby, will violate any constitution, statute, regulation, rule, injunction, judgement, order, decree, ~~ruling~~, charge, or other restriction of any government, governmental agency or instrumentality, or court to which ClearComm is subject or any provision of the limited partnership agreement of ClearComm.

Section **2.04 Legal Proceedings**. To ClearComm's knowledge, there is no action, suit, arbitration, unsatisfied order or judgment, governmental investigation or proceeding pending against ClearComm, which could in any material way interfere with the consummation by ClearComm of the transactions contemplated by ~~this~~ Agreement.

### ARTICLE III REPRESENTATIONS AND WARRANTIES OF TLD

TLD represents and warrants to NewComm that:

Section 3.01 **Organization**. TLD is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Puerto Rico.

Section **3.02 Authority**. TLD ~~has~~ the full right, power, and authority (including full corporate power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the transactions contemplated in this Agreement, except ~~as~~ may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, the Board of Directors of TLD and TLD's shareholders have taken all corporate action necessary to authorize, and have duly authorized the execution, delivery, and performance of ~~this~~ Agreement by TLD. This Agreement constitutes a valid and legally binding obligation of TLD, enforceable in accordance with its terms and conditions.

Section **3.03 No Conflicts**. Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will violate any constitution, statute, regulation, rule, injunction, judgement, order, decree, ruling, charge, or other restriction of any government, governmental agency or instrumentality, or court to which TLD is subject or any provision of the Articles of Incorporation or By-Laws of TLD.



Section 3.04 Legal Proceedings. To TLD's knowledge, there is no action, ~~suit~~, arbitration, unsatisfied order or judgment, governmental investigation or proceeding pending against TLD, which could in any material way interfere with the consummation by TLD of the transactions contemplated by this Agreement.

#### **ARTICLE IV** **REPRESENTATIONS AND WARRANTIES OF NEWCOMM**

NewComm represents and warrants to ClearComm and TLD that:

Section 4.01 Organization. NewComm is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Puerto Rico.

Section 4.02 Authority. NewComm ~~has~~ the full right, power, and authority (including full corporate power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the ~~transactions~~ contemplated in this Agreement, except ~~as~~ may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, the Board of Directors of NewComm and NewComm's shareholders have taken all corporate action necessary to authorize, and have duly authorized the execution, delivery, and performance of this Agreement by NewComm. **This** Agreement constitutes a valid and legally binding obligation of NewComm, enforceable in accordance with its terms and conditions.

Section 4.03 No Conflicts. Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will violate any constitution, ~~statute~~, regulation, rule, injunction, judgement, order, decree, ruling, charge, or other restriction of any government, ~~governmental~~ agency or instrumentality, or court to which NewComm is subject or any provision of the Articles of Incorporation or By-Laws of NewComm. ~~In~~ furtherance, and not in limitation, of the foregoing, the consummation of the transactions contemplated herein will not violate the provisions of Section **14.12** of the Joint Venture Agreement.

Section 4.04 Legal Proceedings. To NewComm's knowledge, there is no action, ~~suit~~, arbitration, unsatisfied ~~order~~ or judgment, governmental investigation or proceeding pending against NewComm, which could in any material way interfere with the consummation by NewComm of the transactions contemplated by this Agreement.

**ARTICLE V**  
**SURVIVAL**

Section **5.01 Survival**. Subject to any limitations expressly set forth in this ~~Agreement~~, any provision of ~~this~~ Agreement which contemplates the performance or existence of obligations ~~after the~~ date hereof, and any and all representations and warranties ~~set~~ forth in ~~this~~ Agreement shall expressly survive and shall be binding upon the Party or Parties obligated thereby, in accordance with the terms of this Agreement.

**ARTICLE VI**  
**INDEMNITY**

Section **6.01 Indemnity**.

a. ClearComm shall indemnify NewComm and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless from and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of ClearComm contained in ~~this~~ Agreement.

b. **TLD** shall indemnify NewComm and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless ~~from~~ and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of TLD contained in this agreement.

c. NewComm shall indemnify each of ClearComm, TLD and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless ~~from~~ and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of NewComm contained in this agreement

ARTICLE VII  
MISCELLANEOUS

Section **7.01** Anti-Dilution. ~~If, after~~ the conversion by TLD of the SCPN and as a ~~result~~ of the transactions contemplated herein, SynCom successfully ~~demand~~s that NewComm ~~adjust~~ the number of shares held by SynCom pursuant to Section FOURTH(f) of the Second Amended and Restated Certificate of Incorporation of NewComm, then the number of ~~shares~~ held by TLD shall be simultaneously adjusted on a pro rata basis to preserve its percentage ownership of NewComm at such point in time.

Section **7.02** Expenses. Each Party shall pay any and all costs incurred by such Party incident to the preparation and execution of this Agreement and performance of its respective obligations hereunder, including, without limitation, the fees and disbursements of legal counsel, accountants and consultants employed by the respective Party in connection with the transactions contemplated by this Agreement.

Section **7.03** Assignability. No Party may assign or transfer its rights and obligations under this Agreement without the prior written approval of the other Parties. This Agreement shall ~~inure~~ only to the benefit of and be binding upon the Parties hereto and their respective successors, representatives, and permitted assigns.

Section **7.04** Applicable Law. This Agreement shall be construed, interpreted, enforced in accordance with, and governed by, the laws of the Commonwealth of Puerto Rico.

Section **7.05** Counterparts. ~~This~~ Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

Section **7.06** Entire Agreement. This Agreement and the agreements, instruments, exhibits, and other writings referred to in ~~this~~ Agreement contain the entire understanding of the parties with respect to the subject matter of this Agreement. There ~~are~~ no restrictions, agreements, promises, warranties, covenants or undertakings other than those expressly set forth herein or therein. This Agreement supersedes all prior agreements and understandings between the parties with respect to its subject matter.

Section **7.07** Amendments. ~~This~~ Agreement may not be amended, ~~changed~~ or terminated orally, and no attempted change, termination or waiver of any of the provisions ~~hereof~~ shall be binding unless in writing and signed by the ~~Party~~ against whom the amendment, change, termination or waiver is sought to be enforced.

Section **7.08** Exhibits. Each exhibit hereto shall be attached hereto and shall be considered a part hereof ~~as~~ if set forth in the body hereof in full.

Section **7.09** Negotiated Transactions. The provisions of ~~this~~ Agreement were negotiated by the Parties hereto and said agreement shall be deemed to have been ~~drafted~~ by all of the Parties hereto.

Section **7.10** Notices. All notices, claims, certificates, requests, demands, and other communications under this Agreement shall be in writing and notices will be deemed to have ~~been~~ duly given if delivered or mailed, registered or certified mail, postage prepaid, return receipt requested, or for overnight delivery by a nationally recognized overnight mail service, ~~as~~ follows:

If to ClearComm, L.P., to:

ClearComm, L.P.  
268 Muñoz Rivera Avenue  
Suite 2206  
San Juan, P.R. 00918-1929  
Attention: Javier **O.** Lamoso  
Fax: (787) 620-0144

If to **TLD**, to:

Telefonica Larga Distancia de Puerto Rico, Inc.  
P.O. Box 70325  
San Juan, P.R. 00936-8325  
Attention: Maria Dolores Pizarro  
Fax: (787) 749-5880

If to NewComm Wireless Services, Inc., to:

NewComm Wireless Services, Inc.  
City View Plaza, Suite 700  
Car. 165 #48  
Guaynabo, P.R. 00968  
Attention: Javier **O.** Lamoso  
Fax: (787) 774-5058

with a copy to:

Adsuar **Muñiz** Goyco & Besosa, P.S.C.  
268 Muñoz Rivera Avenue  
Suite **1400**  
Hato Rey, Puerto Rico **00918**  
Attention: Fernando Goyco-Covas, Esq.  
Facsimile No.: **(787) 756-9010**

or to such other address **as** the Party to whom notice is to be given previously may have furnished to the other Party in writing in the manner set forth in **this** Section.


Section **7.11** Severability. If any **term**, condition or provision of **this** Agreement shall be declared invalid or unenforceable, the remainder of the Agreementf other than such term, condition or provision, shall not be affected thereby and shall remain in full force and effect and shall be valid and enforceable to the fullest extent permitted by law.

Section **7.12** Jurisdiction. Each of ClearComm, TLD and NewComm hereby submits to the jurisdiction of the courts of the Commonwealth of Puerto Rico in any action or proceeding arising out of or relating to **this** Agreement and agrees that all **claims** in respect of the action or proceeding may be heard and determined in any such court. Each of **ClearComm**, TLD and NewComm agree not to bring any action or proceeding **arising** out of or relating to **this** Agreement in any other court. Each of ClearComm, TLD and NewComm hereby waives any defense of inconvenient forum to the maintenance of any action or proceeding so brought and waives any bond, surety, or other security that might be required of any other Party with respect thereto.

Section **7.13** Other. Unless the context otherwise indicates, words importing the singular number shall include the plural number and vice versa. The terms "hereby," "hereof," "hereto," "herein," "hereunder," and any similar terms, **as** used in this Agreement, refer to this Agreement **as** a whole.

IN WITNESS WHEREOF, the Parties **hereby** have caused **this** Agreement to be **duly** executed **as** of the day and **year** first above written.


**CLEARCOMM, L.P.**  
**BY ITS GENERAL PARTNER**  
**SUPERTEL COMMUNICATION CORP.**

By:   
Name: Javier O. Lamoso  
Title: President

**TELEFÓNICA LARGA DISTANCIA DE**  
**PUERTO RICO, INC.**

By: \_\_\_\_\_  
Name: Victoria Medina  
Title: General Manager


**NEWCOMM WIRELESS SERVICES, INC.**

By:   
Name: Javier O. Lamoso  
Title: Resident

-10-

IN WITNESS WHEREOF, the Parties hereby have caused this Agreement to be duly executed as of the day and year first above written.


CLEARCOMM, L.P.  
BY ITS GENERAL PARTNER  
SUPERTEL COMMUNICATION CORP.

By:   
Name: Javier O. Lamoso  
Title: Resident

TELEFÓNICA LARGA DISTANCIA DE  
PUERTO RICO, INC.

By:   
Name: Victoria Medina  
Title: General Manager

NEWCOMM WIRELESS SERVICES, INC.

By:   
Name: Javier O. Lamoso  
Title: President

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May-23-2002 08:52am From: ADRIAN MUNIZ GOYCO DESOSA

+7877569092

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-10-

IN WITNESS WHEREOF, the Parties hereby have caused this Agreement to be duly executed as of the day and year first above written.


CLEARCOMM, L.P.  
BY ITS GENERAL PARTNER  
SUPERTEL COMMUNICATION CORP.

TELEFÓNICA LARGA DISTANCIA DE  
PUERTO RICO, INC.

By:   
Name: Javier O. Llanoso  
Title: President

By:   
Name: Victoria Medina  
Title: General Manager

NEWCOMM WIRELESS SERVICES, INC.

By:   
Name: Javier O. Llanoso  
Title: President

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P. 02



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**Attachment D**

**Declaration of Javier Lamosa**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

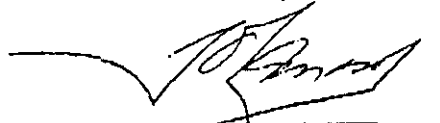
In the Matter of )  
 )  
TFM Puerto Rico, Inc. )  
 )  
Petition for Declaratory Ruling Pursuant to )  
Section 310(b)(4) of the Communications )  
Act of 1934 )

DECLARATION OF JAVIER LAMOSO

Javier Lamoso does hereby attest and affirm as follows:

1. I am the President of ClearComm, L.P.
2. A survey of the ownership of ClearComm, L.P., based on the mailing address supplied by the limited partner of record in the partnership records, discloses no more than 4 percent non-U.S. ownership.
3. Given a number of ClearComm, L.P. limited partners who are known to be U.S. citizens living abroad, I believe that 4 percent non-U.S. ownership overstates actual non-U.S. ownership of ClearComm, L.P.

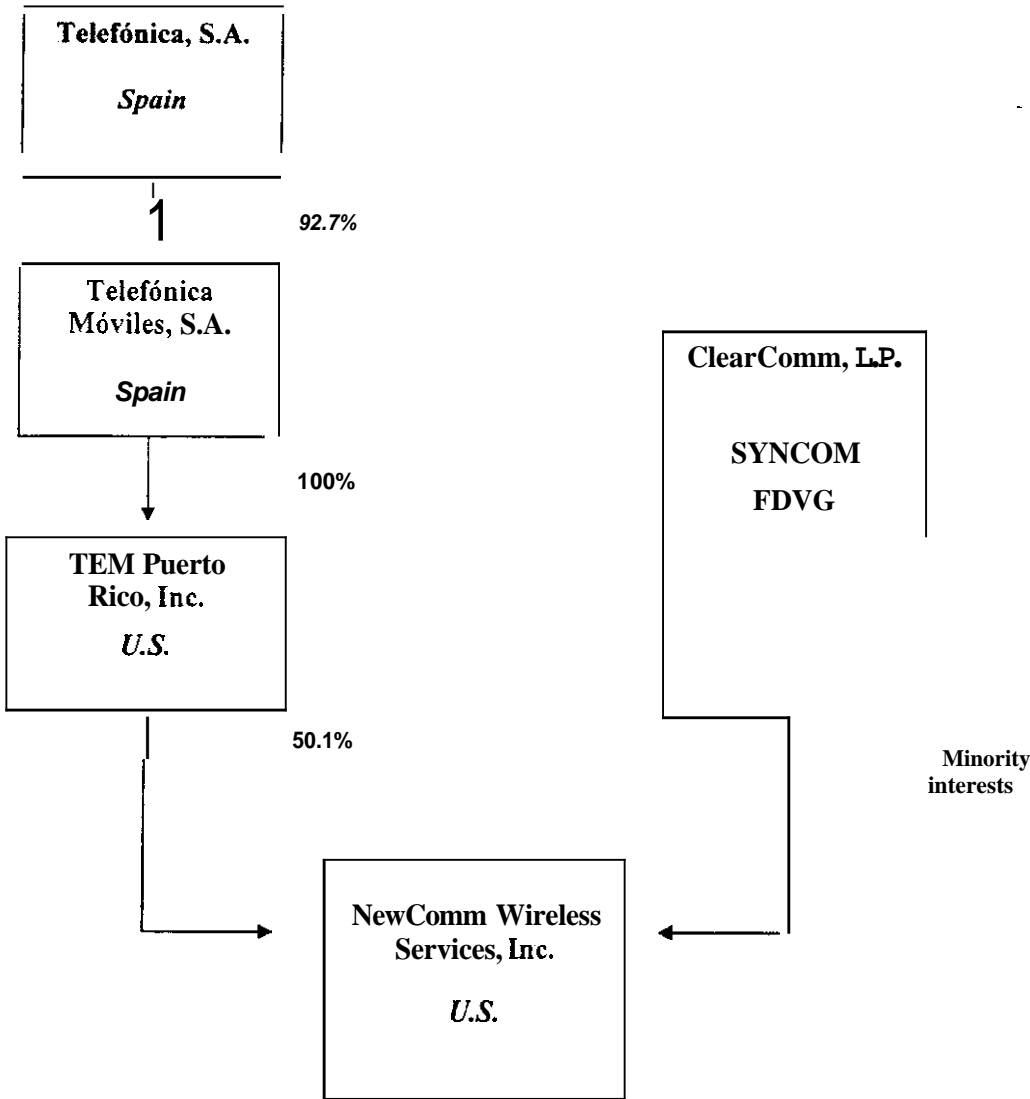
Further declarant sayeth not.

  
\_\_\_\_\_  
Javier Lamoso, President  
ClearComm, L.P.

Dated: October 2, 2002

Attachment E

Proposed Ownership Structure of NewComm Wireless Services, Inc.



**Attachment F**

**Petition for Declaratory Ruling .**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

TEM Puerto Rico, Inc.

Petition for Declaratory Ruling Pursuant to  
Section **310(b)(4)** of the Communications  
Act of **1934**

To: International Bureau

PETITION FOR DECLARATORY RULING

I. INTRODUCTION

TEM Puerto Rico, Inc. (“TEM PR”) hereby petitions the International Bureau (“Bureau”) of the Federal Communications Commission (“Commission”), pursuant to Section **310(b)(4)** of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. **§310(b)(4) (2002)** and Section **1.2** of the Commission’s rules, 47 C.F.R. **§ 1.2 (2002)**, for a declaratory ruling that it is in the public interest for TEM PR, a U.S. corporation that is an indirect subsidiary of Telefonica S.A. (“Telefonica”), a publicly-traded corporation organized under the laws of Spain, to hold a greater than **25%** interest in NewComm Wireless Services, Inc. (“NewComm”), a corporation organized under the laws of the Commonwealth of Puerto Rico, that is a broadband personal communications service (“PCS”) and common carrier point-to-point microwave licensee. Specifically, TEM PR seeks a declaratory ruling from the Bureau that it is in the public interest for NewComm to have ultimate foreign ownership by a Spanish corporation of **50.1%** and non-

controlling, indirect ownership by citizens of foreign countries other than Spain of no more than two percent resulting in combined non-U.S. ownership of approximately 51.61%.<sup>1</sup>

## **n. BACKGROUND AND DEAL STRUCTURE**

The Parties. NewComm holds two broadband PCS licenses, 131 common carrier point-to-point microwave licenses, and an authorization to provide global resale and facilities-based telecommunications services pursuant to Section 214 of the Act, 47 U.S.C. §214 (2002). The current organizational structure of NewComm is set forth in Exhibit B to this Petition for Declaratory Ruling (“Petition”). NewComm is majority owned by ClearComm, a limited partnership organized under the laws of the state of Delaware, composed of one general partner, SuperTel Communications Corp. (“SuperTel”), a corporation organized under the laws of the Commonwealth of Puerto Rico, and approximately 1600 individual limited partners. Syndicated Communications Venture Partners IV, L.P. (“SYNCOM”) and Fleet Development Ventures Group (“FDVG”) also hold minority interests in NewComm of 8.02% and 4.08%, respectively.

TEM PR is a corporation organized under the laws of the Commonwealth of Puerto Rico and is wholly-owned by Telefonica Moviles, S.A. (“Moviles”), a publicly-traded Spanish corporation, which is controlled by Telefonica, S.A. (“Telefonica”), also a publicly-traded

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<sup>1</sup> In addition to Telefonica’s foreign ownership, ClearComm, which will retain a substantial minority interest in NewComm following consummation of the proposed transaction, has non-U.S. investment of no more than four percent (4%). See Declaration of Javier Lamoso, attached hereto as Exhibit A. Under Section 1.2112(a)(5), four percent ownership of ClearComm is equal to 1.51% ownership of NewComm. Considering Telefonica’s proposed 50.1% ownership of NewComm and ClearComm’s foreign ownership of up to four percent (4%), under Section 310(b)(4), a public interest determination is required before the proposed transaction may be consummated.

Spanish corporation.<sup>2</sup> Under certain circumstances, certain company resolutions of Telefónica and Móviles which significantly impact Telefónica or Móviles property in Spain are subject to **rules** requiring advance administrative authorization (“Authorization Rules”) from the government of Spain.’ The Authorization Rules will remain in force until February 18, 2007, unless they are amended or invalidated before then. Exhibit C-1 is a certified English translation of the documents that provide for the application of the Authorization Rules to Telefonica and Moviles. Exhibit C-2 is the original Spanish version of the documents.

The Authorization Rules do not apply to the proposed transaction. **As** indicated in Exhibits C-1 and C-2, the Authorization Rules do not deprive Telefónica or Móviles of legitimate business autonomy in the management of Telefónica or Móviles. Rather, they are merely rules of administrative authorization which apply in limited circumstances, which do not

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<sup>2</sup> Telefonica **owns** 92.7 % of Moviles’ issued and outstanding shares, leaving **just** over seven percent (7%) of Móviles’ shares to be traded on the Spanish continuous market and the Madrid, Barcelona, Bilbao and Valencia stock exchanges, **as well as** the New **York** Stock Exchange, under the symbol TEM. Moviles was included in the Spanish stock exchange’s **Ibex-35** index on January 2, 2001. Telefonica’s stock is traded on the continuous market on the Spanish Stock Exchanges and the Madrid, Barcelona, Bilbao and Valencia stock exchanges and **on** those exchanges in London, **Paris**, Frankfurt, Tokyo, New York (under the symbol TEF), Lima, Buenos Aires, São Paulo and SEAQ International Exchange in London. Telefonica’s two largest shareholders are Chase Manhattan Bank, N.A., which holds **8.131** % of Telefónica’s issued and outstanding stock, and Banco Bilbao Vizcaya Argentina, S.A., which currently holds 5.19% and has rights to acquire up to 10% of Telefonica’s issued and outstanding stock. No other single shareholder holds five percent (**5%**) or greater of Telefonica’s issued and outstanding stock. Due to the nature of these publicly traded companies, it is not possible to ascertain the countries and amounts **of** non-Spanish foreign ownership in Telefonica of less than five percent (**5%**).

<sup>3</sup> The resolutions that are subject to the Authorization Rules (“Covered Resolutions”) **are** those resolutions that involve the following major transactions by Telefonica or Móviles: (i) voluntary dissolution, spin-off, or merger; (ii) substitution of company purpose; (iii) sale or encumbrance, in any form and on any basis, of the covered communications assets; and (iv) sale or encumbrance, in any form and on any basis, of shares or certificates representing capital that are owned by Telefonica in Telefonica or Moviles.

include the proposed transaction. The Authorization Rules are the least **intrusive** means of preserving the general interest of the Spanish government in the continued health of its telecommunications service providers.

Background. In March 1999, ClearComm entered into a Joint Venture Agreement (“JVA”) with Telefonica Larga Distancia de Puerto Rico, Inc. (“TLD”), an indirect Telefónica subsidiary, which formed **NewComm**.<sup>4</sup> NewComm commenced commercial wireless service in Puerto Rico in September 1999. Under the terms of the JVA, and pursuant to Commission consent, ClearComm assigned its licenses to NewComm and TLD loaned **working** capital to NewComm.<sup>5</sup> That loan was evidenced by promissory notes in favor of TLD (“Notes”) secured by a TLD right to convert the Notes, as well **as** certain subsequent non-dilution notes, into approximately 49.9% of the equity and 25% of the voting rights of **NewComm**.<sup>6</sup>

**On** March 12, 2002, TLD and ClearComm executed a Stock Purchase Agreement (“Stock Purchase Agreement”) which, together with modified rights under the Notes, would give TLD a controlling **50.1%** voting ownership interest in **NewComm**.<sup>7</sup> A copy of the Stock Purchase Agreement is attached to this Petition **as** Exhibit D.

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<sup>4</sup> TLD is indirectly controlled by Telefonica through its wholly owned subsidiary, Telefonica Internacional, S.A. (“TISA”), a company incorporated in Spain, and directly controlled by Telefonica International Holding, B.V. (“TIH”), a company incorporated in the Netherlands and a wholly-owned subsidiary of TISA.

<sup>5</sup> See Application of ClearComm, L.P. for Consent to Pro Forma Assignment to NewComm Wireless Services, Inc., of C Block Broadband PCS Licenses for BTAs B488 and B489, *Memorandum Opinion and Order*, 16 FCC Rcd 18627, 18630 (2001) (“**Order**”).

<sup>6</sup> *Id.*

<sup>7</sup> TLD currently manages the Puerto Rico system pursuant to a Management Agreement **Order**, 16 FCC Rcd 18631. See *supra* note 8.



Subject Transaction. Subject to Commission consent, TEM PR **intends** to exercise its rights under the Notes and under the Stock Purchase Agreement to acquire a controlling **50.1%** majority voting ownership interest in NewComm from **ClearComm**.<sup>8</sup> TEM PR proposes to do so as follows:

First, during the pendency of this Petition and the related applications discussed below, TLD shall assign the promissory notes, with their attendant conversion rights, and the Stock Purchase Agreement to TEM PR in exchange for 100% of the voting interests in TEM PR. TLD also shall assign to TEM PR an agreement between TLD and **ClearComm** that currently provides for TLD to exercise its conversion rights and acquire additional shares in order to obtain a 50.1% interest in NewComm?

Second, also during the pendency of this Petition, control of TEM PR will be transferred from TLD to Móviles. Because Móviles, **through** its subsidiaries and affiliates, holds and/or manages the wireless components **of** Telefónica's telecommunications business worldwide, **this** transfer will allow for the eventual consolidation of control and operation of NewComm's licenses and authorizations in the **arm** of Telefonica that possesses the most experience and expertise in providing commercial wireless services

Finally, after Commission consent to the transfer of control of NewComm is obtained, TEM PR will exercise the conversion and acquisition rights obtained from TLD, in accordance

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<sup>8</sup> TLD also will assign its rights under the Management Agreement to TEM PR pursuant to which TEM PR will undertake day-to-day management of the Puerto Rico stations, subject to ClearComm's ultimate control and supervision, as set forth in the Management Agreement.

<sup>9</sup> Due to non-dilution provisions associated with the SYNCOM and FDVG investments, their interests will remain consistent following the conversion of TLD's rights under the promissory notes and the consummation of the Stock Purchase Agreement. Upon consummation **of** the proposed transaction, TEM PR will own 50.1% of NewComm's issued and outstanding stock; ClearComm will own **37.8%**; SYNCOM will own 8.02% and FDVG will own **4.08%**.

with the agreements entered into between TLD and ClearComm. Upon exercise of **these** rights TEM PR will acquire a **50.1%** interest in NewComm. Following consummation of **this** transfer of control of NewComm to TEM PR, NewComm will be directly **controlled** by TEM PR, which will be controlled by Moviles, which is, in turn, **controlled** by Telefónica. The proposed ownership structure of NewComm, after consummation, is set forth in Exhibit E to **this** Petition.

The Commission has held that under the **current** ownership structure of NewComm, ClearComm holds both *de jure* and *de facto* control of NewComm.<sup>10</sup> Until such time **as** Commission consent to this transaction is obtained and the underlying transaction is consummated, both *de jure* and *de facto* control of NewComm will remain with ClearComm.

Applications. Concurrently with this Petition, the Parties also are filing applications (“Applications”) for Commission consent to the transfer of control **from** ClearComm to TEM PR of NewComm in its capacity as holder of the following authorizations: (a) two broadband PCS licenses;” (b) 131 common carrier point-to-point microwave licenses; and (c) **a** certificate, issued pursuant to Section 214 of the Act, authorizing NewComm to provide global **facilities-** based and resale telecommunications services.” The Parties **also** will file voluntarily with the U.S. Department of Treasury Committee on Foreign Investment in the United States (“CFIUS”) **a** notification regarding the proposed transaction and are working with the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) (collectively, DOJ and FBI shall be referred to **as** the “Executive Agencies”) to reach agreement on a Network Security Agreement

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<sup>10</sup> See Order, 16 FCC Rcd 18633.

<sup>11</sup> See Call Signs KNLF736 and KNLF746.

<sup>12</sup> See FCC File No. ITC-214-19990615-00426.

**III. CONSUMMATION OF THE PROPOSED TRANSACTION WILL NOT VIOLATE THE ACT OR THE COMMISSIONS RULES, REGULATIONS OR POLICIES AND WILL NOT BE DETRIMENTAL TO THE PUBLIC INTEREST.**

**A. Grant of This Petition is in the Public Interest.**

In considering the proposed transaction under Section 310(b) of the Act, the Commission must determine whether consent to the Applications and grant of this Petition serves the public interest. Traditionally, the Commission considers the benefits of grant **as** compared to the possible detrimental effect on the public interest. The Commission's consideration of the proposed foreign ownership of a Commission licensee in excess of 25% will be informed by Section 310(b)(4) of the Act and the Commission's decisions implementing it.

In the ~~Foreign Participation~~ Order," the Commission adopted an open entry standard, including a presumption that indirect foreign ownership above the 25% level specified in Section 310(b)(4) serves the public interest when the investing company is from a World Trade Organization ("WTO") member **country**.<sup>14</sup> Specifically, the Commission stated:

Because additional foreign investment can promote competition in the **U.S.** market, we conclude that the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees."

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<sup>13</sup> See Rules and Policies on Foreign Participation in the **U.S.** Telecommunications Market, *Report and Order*, 12 FCC Rcd. 23891 (1997) ("Foreign Participation Order").

<sup>14</sup> *Id.*, 12 FCC Rcd 23913, 23940

<sup>15</sup> *Id.*, 12 FCC Rcd 23940

In the instant case, TEM PR is **owned** directly by Moviles and is **owned** indirectly by Telefonica, both of which **are** corporations organized under the laws of Spain. Spain is a member of the **WTO**.<sup>16</sup> The Commission's public interest presumption fully applies."

The prompt grant of this Petition will serve the public interest, **as** it would promote competition in the U.S. market by encouraging additional **investment** and competition in the Puerto Rico wireless service market.

Specifically, the proposed transaction will mark the entry of Telefonica into the **U.S.** commercial mobile radio services marketplace, more particularly, in Puerto Rico.<sup>18</sup> Telefonica and its subsidiaries, including TEM PR, are the leading telecommunications operators in the Spanish and Portuguese-speaking world. Beginning in **1924**, Telefonica provided every kind of telecommunications service, first as a public company and then beginning in 1980, **as** an increasingly privately-held, publicly-traded company. The Telefónica group of companies has over **75 years** of experience providing a wide variety of quality telecommunications service to government, commercial and individual customers throughout Spain, the rest of Europe and Latin America. **As** an indirect subsidiary of Telefónica, TEM PR will bring substantial economic resources and technical expertise to enhance the competitiveness **of** NewComm's PCS

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<sup>16</sup> See [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (indicating that Spain became a member of the WTO on **January** 1, 1995).

<sup>17</sup> The Commission specifically notes that the presumption applies to "petitions for declaratory rulings by existing or prospective licensees that the public interest would be served by allowing them to exceed **25** percent indirect foreign ownership." Foreign Participation Order, at 23940.

<sup>18</sup> The Commission previously has found Telefonica qualified to control a U.S. fixed wireless license. Specifically, Telefonica Data Licensing, Inc., an indirect subsidiary of Telefónica, participated in Auction Number 30, completed May 9, 2000, and was issued a 39 GHz license for a geographic area encompassing **Puerto Rico** and the U.S. Virgin Islands. See FCC File No. ISP-PDR-200003 13-00001.

operations through price, product and quality of service competition. Through the collective experience of the Telefónica family of companies, TEM PR is well positioned to focus on the provision of quality and innovative services to customers in Puerto Rico.

Through the proposed transaction, TEM PR will move into a vibrantly competitive market. AT&T Wireless, Sprint PCS, Cingular Wireless, Centennial and Verizon Wireless are among the active service providers. None of those competitors will be eliminated or otherwise adversely impacted by consummation of the proposed transaction. In the *DT Order*,<sup>19</sup> the Commission concluded that Voicestream likely would be unable to engage in successful price predation because there were at least six other mobile wireless companies with more subscribers and more revenues in the market than VoiceStream.<sup>20</sup> Through NewComm, TEM PR will be unable to engage in successful price predation because (1) there are at least four PCS or cellular carriers with more subscribers and more revenues than NewComm in the Puerto Rico market and (2) as a widely-held publicly traded carrier that is not owned by a foreign government, Telefónica has no ability to underprice through subsidies routed from government supported monopoly operations. Additionally, in the *DT Order*, the Commission allowed foreign government ownership of a national PCS service provider. NewComm provides service exclusively on the island of Puerto Rico.

More importantly, grant of consent to the proposed transaction and the instant Petition are consistent with the Commission's rules and policies as set forth in the *Foreign Participation*

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<sup>19</sup> See In re Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001) ("*DT Order*").

<sup>20</sup> Importantly, unlike TEM PR, at the time of the *DT Order*, VoiceStream was majority-owned by a foreign government. *Id.* at 9784.

**Order.** In complying with the WTO Basic Telecom Agreement, the Commission adopted a rebuttable presumption that competitive concerns are not raised by **foreign** ownership of FCC-licensed entities if the foreign owners are from WTO member countries, like Spain.

Accordingly, TEM PR submits that grant of the Applications and this Petition is in the public interest because it will enhance competition and grant is consistent with the Commission's commitments under the WTO Basic Telecom Agreement.

**B. The Authorization Rules Do Not Preclude Grant of This Petition**

There is no basis to conclude that the proposed transaction would harm the public interest. Rather, the proposed transaction will ensure the viability of a competitive wireless carrier **on** the island of Puerto Rico.

Telefonica **and** Moviles, TEM PR's indirect owners, are subject to the Authorization Rules. The Authorization Rules are the only relationship between each of Telefónica and Moviles and the government of Spain." As explained *supra*, the Authorization **Rules** concern only those types of major corporate decisions for which minority shareholder protection is traditionally **accorded**.<sup>22</sup> Even if the Authorization Rules gave the government of Spain some level of influence over TEM PR, the **Commission** has stated that Section 310(b)(4) of the **Act**

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<sup>21</sup> The government of Spain holds no equity interest in Telefónica. The government of Spain has no economic interest to protect through granting Telefónica access to capital at an artificially low cost. There is no economic reason that the government of Spain would tolerate subsidization of Telefonica's **U.S.** operations through operations in its home market. There is no economic incentive for the government of Spain to give preferential regulatory treatment to Telefónica. In short, there is no concern that the Spanish government will take any action to promote Telefonica in the face of contrary market forces to the detriment of competition in the **U.S.** The Spanish government merely retains authority to protect the provision of telecommunications services in Spain through the Authorization Rules.

<sup>22</sup> See, e.g., **DT Order**, 16 FCC Rcd 9797.

gives no indication that foreign governments **are** to be treated any differently than aliens or foreign corporations.<sup>23</sup>

Telefónica is subject to competition even in its home market.<sup>24</sup> At least five other carriers provide services competitive with Telefónica in Spain? Additionally, Telefónica **has** no incentive to cross-subsidize its U.S. operations through its Spanish operations.<sup>26</sup> If Telefónica attempted to subsidize its **U.S.** operations through rate increases in its home market, it would lose market share in its core business. Sixty-five percent (65%) of Telefonica's earnings before interest, tax, depreciation and amortization ("EBITDA") is earned in Spain, while less than **2%** of its EBITDA is earned in the U.S.<sup>27</sup>

As indicated below, Telefónica is working with CFIUS and the Executive Agencies to resolve concerns about national security, law enforcement and public safety arising from

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<sup>23</sup> The Commission has considered veto rights like the Authorization Rules **and** found that the veto rights did not give "control" over the licensee to the shareholders *granted* the veto rights. The Commission found that when considering the veto rights alone, the protected shareholder had no "attributable ownership" in the licensee. *DT Order*, 16 FCC Rcd 9806.

<sup>24</sup> In addition, in 1992, the Commission considered the potential for Telefónica to abuse its market power in Spain to the detriment of unaffiliated U.S. international carriers. *Telefónica Larga Distancia de Puerto Rico*, 8 FCC Rcd **106**, 111-113 (1992). In 1992, competitive entry was not allowed in Spain. Even **so**, the Commission found no reason to deny Telefonica's application to enter the long distance market in Puerto Rico. In the ten years since, Spain has opened its telecommunications markets to competition and Telefonica experiences vigorous competition in its home market.

<sup>25</sup> See Company Profile, Telefonica, S.A., *available at*, <http://www.hoovers.codco/capsule/6/0.2163,41846,00.html>

<sup>26</sup> Telefonica is subject to the imposition of price cap regulation under the General Law on Telecommunications.

<sup>27</sup> See Telefonica, S.A., Selected Financial Data, *available at*, <http://www.telefonica.com/quienes/ing/06/textos/02.html>

Telefónica's proposed ownership interest in NewComm. Considering the general concerns discussed in the *DT Order*, there is no public interest barrier to grant of the Commission's consent to the proposed transaction and this Petition

#### IV. EXECUTIVE BRANCH REVIEW

The *Foreign Participation Order* provides that, in evaluating proposed foreign ownership under Section 310(b), the Commission must accord deference to the Executive Branch with respect to any national security or law enforcement concerns identified by Executive Agencies in connection with a proposed transaction?' TEM PR has held preliminary discussions with the Executive Agencies, and understands that there are law enforcement, national security, and public safety issues that the Executive Agencies want to review in connection with the transaction proposed herein. TEM PR anticipates that any issues raised by the Executive Agencies can be fully addressed **through** an agreement with the Executive Agencies.

Based on the discussions with the Executive Agencies, and with the concurrence of the Executive Agencies, TEM PR **requests** that the Commission commence its review and processing of this Petition. TEM PR **asks** that the Commission place the Petition on public notice for public comment, but defer substantive action concerning the Applications and this Petition pending notification to the Commission that all issues identified by the Executive Agencies have been resolved. **If** the **issues** identified by the Executive Agencies can be resolved through an agreement between NewComm and the Executive Agencies, TEM PR anticipates that the agreement with the Executive Agencies will be filed with the Commission along with a

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<sup>28</sup> See Foreign Participation Order, at 23918,23920-23921; see *also* 47 U.S.C. § 310(b)(4).



request that the Commission condition the grant of this Petition and any consent to the proposed transaction on compliance with the agreement with the Executive Agencies.

**IV. CONCLUSION**

For the foregoing reasons, TEM PR requests that the Commission declare that indirect foreign ownership of NewComm by TEM PR beyond the 25% threshold, more specifically, 51.61%, is in the public interest.

[Signatures Follow]

Respectfully submitted,

TEM Puerto Rico, Inc.

A handwritten signature in cursive script, appearing to read "Richard Rubin", is written over a horizontal line.

Richard Rubin  
Marjorie Conner

Akin Gump Strauss Auer & Feld L.L.P.  
1676 International Drive, Penthouse  
McLean, VA 22102  
(703) 891-7500

October 2, 2002

*Counsel for TEM Puerto Rico, Inc.*

**BEFORE THE**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of

**TEM Puerto Rico, Inc.**


Petition for Declaratory Ruling Pursuant to  
Section 310(b)(4) of the Communications  
Act of 1934

**Declaration**

I am the Director of the Corporate Legal Office for **TEM Puerto Rico, Inc.** ("TEM PR"), petitioner in the attached Petition for Declaratory Ruling ("Petition"). I have reviewed the Petition. All of the facts set forth in the Petition which relate to **TEM PR**, and its parent corporation, **Telefónica Móviles, S.A.** ("Móviles"), a publicly-traded Spanish corporation and its parent, **Telefónica, S.A.** ("**Telefónica**"), also a publicly-traded Spanish corporation, are true and correct to the best of my personal knowledge, information and belief.

Pursuant to Sections 1.2001 through 1.2003 of the Commission's rules, I also certify that no party related to **TEM PR**, **Móviles** or **Telefónica** has been denied federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.

**TEM Puerto Rico, Inc.**

By:   
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María Dolores Pizarro  
Director of the Corporate Legal Office

October 2, 2002